

State of Colorado



Bill Owens
Governor

John Zakhem
Board Chair

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Board Director

State Personnel Board
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AGENDA PUBLIC BOARD MEETING May 16, 2006

A public meeting of the State Personnel Board will be held on **Tuesday, May 16, 2006, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.** The public meeting will commence at 9:00 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by May 11, 2006.

I. REQUESTS FOR RESIDENCY WAIVERS

- A. May 1, 2006 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

- A. Cases on Remand

1. Dan Wells and Barry Rice v. Department of Higher Education, University of Colorado at Denver, Auraria Media Center, Auraria Library and Auraria Higher Education Center, State Personnel Board case number 2002B092(C), Court of Appeals case no. 2004CA0086.

Complainants appealed their layoffs by Respondent University of Colorado at Denver (UCD) and Respondent Auraria Higher Education Center's (AHEC) failure to implement their retention rights. Wells sought back pay, interest, attorney fees and costs, and reinstatement to his former position, or employment with the University of Colorado at Denver; Rice sought reinstatement, back pay, interest, costs and attorney fees. After hearing, the ALJ ordered that, with regards to Wells, Respondent UCD's actions were affirmed and Respondent AHEC's actions were affirmed; and with regards to Rice, Respondent UCD's actions were affirmed. However, AHEC was ordered to appoint Rice to a Telecommunication/Electronic Specialist II position and to pay Rice back pay and benefits, with an offset for any unemployment compensation or other type of compensation received, from April 15, 2002, to the date of reinstatement. On June 23, 2003, the Initial Decision of the Administrative Law Judge was issued.

On December 19, 2003, the Board voted to adopt the Findings of Fact and

Conclusions of Law 1, 2 and 4, in the Initial Decision of the Administrative Law Judge, but to reverse the Administrative Law Judge on Conclusion of Law 3 ("Respondent Auraria Higher Education Center's actions, with regards to Complainant Rice, were arbitrary, capricious or contrary to rule or law"). On January 21, 2004, a Notice of Appeal was filed with the Court of Appeals. On June 16, 2005, the Colorado Court of Appeals reversed the Board with regards to Conclusion of Law 3 and affirmed the ALJ's Initial Decision as a whole. On September 5, 2005, a Petition for Certiorari was filed by Petitioner/Appellant Dan Wells with the Colorado Supreme Court, which was denied on April 3, 2006.

On April 6, 2006, the Mandate of the Court of Appeals was issued, "Order Affirmed in Part, Reversed in Part, and Case Remanded with Directions," finding that AHEC's actions as to Wells were not arbitrary, capricious, or contrary to rule or law; affirming the Board's order as to Wells; reversing the Board's order as to Rice; and remanding the case with directions to reinstate the ALJ's order regarding Rice.

B. Petitions for Declaratory Order

1. Renewed Petition for Declaratory Order of Barry Rice v. Trustees of the State Colleges in Colorado, Auraria Higher Education, Auraria Media Center, State Personnel Board case number 2006D002.

See Cases on Remand (above) for summary of this case.

On January 19, 2006, Complainant filed a Petition for Declaratory Order. On March 5, 2006, the Board issued its Order Denying Petition for Declaratory Order based on jurisdictional grounds. Following the April 6, 2006 Mandate from the Court of Appeals, Complainant filed his Renewed Petition for Declaratory Order. On May 4, 2006, Respondent filed its Response to Complainant's Renewed Petition for Declaratory Order.

2. Petition for Declaratory Order of the Colorado Federation of Public Employees (CFPE) v. Department of Personnel and Administration, State Personnel Board case number 2006D003.

On February 8, 2006, CFPE filed a petition for declaratory order asking that the State Personnel Board act immediately to provide an interpretation of the law and guidance in the following areas, which CFPE asserts are within the Board's full jurisdiction and which were previously covered by the Director's Procedures: Director's Procedure 4-24 - Referrals for Multiple Vacancies, Director's Procedures 4-31 - Temporaries, and Procedures 10-3(F) and 10-5 - Personal Services Contracts.

On April 4, 2006, CFPE filed a Supplement to its Petition for Declaratory Order, reiterating its request that the Board provide interpretive guidance on DPA procedures 4-24 and 4-31.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

- A. Patricia Jones v. Department of Corrections, State Personnel Board case number 2003B165.

Complainant, a budget analyst, appealed the abolishment of her position by Respondent,

requesting reinstatement, back pay, an award of attorney fees and costs, and sanctions against her appointing authority. After hearing, the ALJ determined that Respondent's action was arbitrary, capricious, or contrary to rule or law because there was no lack of funds necessitating the abolishment of Complainant's position; therefore, the layoff was contrary to state law and Board Rule R-7-7. The ALJ also found that Respondent's violation of its own layoff directives was arbitrary and capricious, but that Respondent did not violate the Employee Protection (Whistleblower) Act in abolishing Complainant's position. In addition, the ALJ concluded that Respondent retaliated against Complainant for appealing her layoff, consistent with the agency's policy as enunciated in an August 15, 2003 memorandum, including transferring her to a clerical job and eliminating a budget analyst position from her reach. As a result, the ALJ ordered that Complainant is reinstated to the budget analyst position she occupied at Headquarters in Colorado Springs, retroactive to July 1, 2003; Respondent is to pay Complainant's attorney fees and costs incurred in this action; Respondent is to refrain from any further retaliation against Complainant for filing this appeal; and Respondent is to rescind the August 15, 2003 memorandum.

On December 15, 2005, the ALJ issued the Initial Decision of the Administrative Law Judge. On January 13, 2006, Respondent filed its Notice of Appeal and Complainant filed her Notice of Cross-Appeal; on March 13, 2006, Respondent filed Respondent's Opening Brief on Appeal from the Initial Decision of the Administrative Law Judge. Complainant's Responsive Brief was filed on April 10, 2006. On April 26, 2006, Respondent filed Respondent's Reply Brief.

B. Leo Bellio v. Department of Revenue, Liquor & Tobacco Enforcement Division, State Personnel Board case number 2005B052(C).

Complainant, a criminal investigator, appealed his suspension, demotion and the imposition of a corrective action by Respondent, and sought rescission of the corrective action, rescission of the disciplinary action, restoration to the rank of Criminal Investigator I in the Liquor & Tobacco Enforcement Division, an award of back pay for the three-day suspension and the difference in pay between the rank of Criminal Investigator I and Criminal Investigator Intern during the period of demotion, entry of a cease and desist order to prohibit the agency from enforcing any current work plans issued against him, and the initiation of disciplinary action against his supervisors for engaging in unlawful discrimination against him based upon his age.

After hearing, the ALJ found that Complainant did not commit all of the acts for which he was disciplined and Respondent failed to fairly consider all of the evidence before it, including the fact that, as established by Complainant's performance evaluations and his nomination for a prestigious state government award, he was a valued employee who had worked for the state for over seventeen years without any prior communication or interpersonal problems with supervisors or a disciplinary history. Additionally, the ALJ determined that, given the gathered evidence, Respondent did not reach reasonable conclusions, thus rendering its decisions arbitrary, capricious, or contrary to rule or law and, further, that the discipline imposed was outside the range of reasonable alternatives. The ALJ ordered that the April 2004 Corrective Action is rescinded and the November 2004 Disciplinary Action is modified to a corrective action; Complainant is awarded full back pay and benefits for the period of his suspension and demotion; Respondent did not discriminate against Complainant based on age; and attorney fees and costs are not awarded.

On December 23, 2005, the ALJ issued the Initial Decision of the Administrative Law Judge. Both Respondent and Complainant filed appeals of the initial decision; however, Respondent withdrew its appeal on March 24, 2006. On April 5, 2006, Complainant filed his Opening Brief. On April 18, 2006, Respondent filed a Motion to Supplement the

Certified Record of the Administrative Proceedings before the State Personnel Board, requesting that Respondent's withdrawal of its appeal be included in the certified record. The Director granted the request to supplement the record on April 25, 2006. On April 26, 2006, Respondent filed its Answer Brief.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

- A. Timothy Kosak v. Department of Transportation, State Personnel Board case number 2005G105.

Complainant, a certified Equipment Mechanic III employed by the Department of Transportation, Region II, challenges the denial of his grievance upholding a February 2005 corrective action. He asserts that the decision was arbitrary and capricious because it was based in part on his request for leave under the Family Medical Leave Act (FMLA). In addition, Complainant objects to his "needs improvement" performance rating, which was given to him subsequent to the corrective action.

On August 1, 2005, Respondent amended the Corrective Action, issuing a new one in place of the February 2005 one. Complainant grieved that corrective action. Respondent denied his grievance and Complainant filed a second petition for hearing. The matters were consolidated, and the parties each filed Supplemental Information Sheets pertaining to the August 2005 corrective action.

Respondent argues that Complainant has failed to state a valid claim warranting a hearing, he has failed to state a claim under the FMLA, and he has failed to state a claim of a performance pay dispute.

On April 7, 2006, the Administrative Law Judge issued a Preliminary Recommendation, recommending that Complainant's petition for hearing be granted.

- B. Cynthia A. Hernandez v. Department of Revenue, Colorado State Lottery, State Personnel Board case number 2006G047.

Complainant is a probationary employee who was terminated from employment. She asks for Board review of her claims of discrimination based on who hired her and her national origin, as well as a review of her unjust termination.

Respondent argues that Complainant has failed to establish a *prima facie* case for discrimination, that Complainant's allegations regarding discrimination based on nationality are unsupported, and that Complainant was terminated for performance issues.

On May 2, 2006, the Administrative Law Judge issued a Preliminary Recommendation, recommending that Complainant's petition for hearing be granted.

- C. Ronnie Gail Clay v. Department of Corrections, Limon Correctional Facility, State Personnel Board case number 2006G046.

Complainant, a probationary Correctional Officer I at the Department of Corrections, Limon Correctional Facility, filed a petition for hearing on January 19, 2006, after being terminated from employment. She asks for reinstatement into her position and Board review of her claims of discrimination based on race/color/creed, and sex, and retaliation.

Respondent argues that Complainant has failed to establish a *prima facie* case of unlawful discrimination based on race/color/creed, and sex, or a claim of retaliation or to

state any unlawful discriminatory action on the part of Respondent.

On May 3, 2006, the Administrative Law Judge issued a Preliminary Recommendation, recommending that Complainant's petition for hearing be granted.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

- A. David Teigen v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel Board case number 2003B127 (April 7, 2006).

Following an evidentiary hearing, the ALJ ordered that Respondent pay Complainant's reasonable attorney fees and costs in the amount of \$79,741.12, plus interest.

VI. REVIEW OF THE MINUTES FROM THE MARCH 21 AND APRIL 18, 2006 PUBLIC MEETINGS OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS APRIL 18, 2006 PUBLIC MEETING:

- A. Olukemi Olawore v. Department of Human Services, Colorado State Veteran's Home at Fitzsimons, State Personnel Board case number 2006G049.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- B. Dava Portales v. Department of Labor and Employment, Unemployment Insurance Section, State Personnel Board case number 2006G045.

The Board voted to adopt, in part, the Preliminary Recommendation of the Administrative Law Judge, granting the Complainant a hearing on the basis that it appears the appointing authority violated Complainant's rights under § 24-34-401, *et seq.*, C.R.S. The Board declined to adopt the other grounds articulated in the Preliminary Recommendation of the Administrative Law Judge as they are outside the scope of the controlling statute, § 24-50-123(3), C.R.S., for granting a hearing. This does not limit the scope of the issues that may be presented at hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

- A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts
- DOC Audit Report Issued April 2006

- B. OTHER BOARD BUSINESS

- Staff Activities

- C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. PROPOSED LEGISLATION AND/OR RULEMAKING

XI. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the March 21 and April 18, 2006 Executive Sessions
- C. Other Business

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NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.

June 20, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
July 18, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
August 15, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
September 19, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
October 17, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
November 21, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
December 19, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604